SUPREME COURT, U. S

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-677

REV. DONALD L. JACKSON,
Petitioner,

v.

THE STATLER FOUNDATION, *et al.*,
Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

BRIEF AND APPENDIX ON BEHALF OF RESPONDENTS, THE BUFFALO FOUNDATION, JAMES H. CUMMINGS FOUNDATION, INC. AND THE WURLITZER FOUNDATION, IN OPPOSITION

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TABLE OF CONTENTS.

	PAGE
Table of Authorities	I
Orders of the Court Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	2
Statement of the Case	3
Argument	6
Conclusion	9
Appendix:	
Order Dismissing Appeal	A1
Amended Complaint (Civil Action No. 1971-592)	A3
Complaint in Transferred Action	A18
Memorandum and Order Transferring Action	A34

TABLE OF CASES.

Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 183 (1955)	8
Cancel v. Wyman, 441 F. 2d 553 (2d Cir., 1971)	8
Enelow v. New York Life Insurance Company, 293 U.S. 379 (1935)	8, 9
Gonzalez v. Automatic Employees Credit Union, *et al.*, 43 U.S.L.W. 4025 at 4028 n. 19 (U.S. Dec. 10, 1974)	8
International Nickel Company v. Martin J. Barry, Inc., 204 F. 2d 583 (4th Cir., 1953)	8
Landis v. North American Company, 299 U.S. 248, 254 (1936)	7
Motolese v. Preston, 172 F. 2d 308 (2d Cir., 1949)	8
Serrano v. Playa Associates, Inc., 390 F. 2d 593 (1st Cir., 1968)	8

PAGE

Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., 385 U.S. 23 (1966) 7
United States v. Chelsea Towers, Inc., 404 F. 2d 329 (3rd Cir., 1968) 8

STATUTES.

28 USC § 1291 2
28 USC § 1292 8
28 USC § 1292(a)(1) 2
42 USC §§ 1981, 1983 and 1985 3
28 USC § 2350 2
Voting Rights Act of 1965, 42 USC 1973 *et seq.* 4, 5, 7

RULES.

Federal Rules of Civil Procedure:
Rules 12 and/or 56 3
Rule 23 8
Rule 19 8
Rule 19(1)(b) 9
9 Moore's Federal Practice ¶ 110.20 [4.-2] at 250 8

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Orders of the Court Below

On October 22, 1974 (not September 18, 1974 as stated at p. 2 of the Petition), the United States Court of Appeals for the Second Circuit issued counterpart orders dismissing without opinion petitioner's appeal from an interlocutory order of the United States District Court for the Western District of New York reaffirming that Court's earlier order temporarily staying further proceedings in the action because a duplicate action is pending in the same

Court. Insofar as here relevant, the Court of Appeals' counterpart orders are identical. (A copy of one such order is reproduced in Respondents' Appendix, pp. A-1—A-2)

Jurisdiction

These respondents do not question the jurisdiction of the United States Supreme Court in the premises. However, 28 USC § 2350, invoked by petitioner, is inapplicable.

Statutes Involved

28 USC § 1291:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . .except where a direct review may be had in the Supreme Court."

28 USC § 1292(a)(1):

> "The courts of appeals shall have jurisdiction of appeals from . . .[i]nterlocutory orders of the district courts of the United States . . .granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court:"

Questions Presented

(1) Does the Court of Appeals have jurisdiction of an appeal from an interlocutory order wherein the District Court deferred plaintiff's motion for a summary judgment and for the appointment of a three-judge court by adhering to its earlier order temporarily staying further proceedings in the action, pending further order, in view of a duplicate action for virtually the same relief previously commenced by the same plaintiff against the same defendants then pending in the same Court?

(2) Did the District Court abuse its discretion by adhering to its previous order staying further proceedings on plaintiff's motion for a summary judgment and for the appointment of a three-judge court where another action previously commenced by the same plaintiff against the same defendants and seeking to vindicate the same alleged rights on the basis of virtually identical allegations was then pending in the same Court?

Statement of the Case

On December 30, 1971, petitioner, *pro se*, commenced Civil Action No. 71-592 in the United States District Court for the Western District of New York against fourteen charitable foundations located in the Western New York area. The complaint, allegedly based on 42 USC §§ 1981, 1983 and 1985, broadly alleged racial discrimination on the part of the defendant foundations in their hiring and portfolio investment practices; racial discrimination against petitioner's private foundation in their grant allocation practices; and discrimination on account of race against the petitioner and his children in regard to petitioner's alleged applications to become a director of the various foundations and to obtain scholarship grants for his children. The complaint demanded injunctive and declaratory relief, money damages, the revocation of the defendant foundations' tax exemptions and judgment directing the foundations to surrender all their assets to the United States Treasury in lieu of taxes.

Depositions were taken and various defendants moved against the complaint under Rules 12 and/or 56 of the Federal Rules of Civil Procedure. On March 7, 1973, the United States District Court for the Western District of New York, Hon. John T. Curtin, dismissed the complaint.

Upon petitioner's appeal to the United States Court of Appeals for the Second Circuit, that Court, in an opinion filed December 4, 1973 (not officially reported) and revised April 5, 1974 (496 F. 2d 623), affirmed in part, reversed in part, and remanded the matter to the District Court.

Upon remand, petitioner, on March 11, 1974 (through an attorney, since withdrawn), moved the District Court for leave to file an amended complaint in Civil Action No. 71-592, attaching a copy of the proposed amended complaint to his motion papers. There was no opposition and the District Court granted the motion on March 29, 1974. (Petitioner's Appendix, p. 15-a)

Insofar as here relevant, the amended complaint in Civil Action No. 71-592 (Respondents' Appendix pp. A-3—A-17) differs from the original complaint in the following respects only: (1) it adds various governmental officials as defendants; (2) it purports to state a claim under the Voting Rights Act of 1965, 42 USC 1972 *et seq.*; (3) it requests the convening of a three-judge court; (4) it omits allegations of racial discrimination based upon alleged refusals to grant scholarships to plaintiff's children; and (5) it omits the request for an order that defendant foundations' assets be paid into the United States Treasury.

On March 28, 1974, petitioner, *pro se*, commenced this duplicate action in the District Court for the District of Columbia. Conceding forum shopping, the complaint in the District of Columbia action alleges in part:

> "This Lawsuit Was Filed In The Western District Of U.S. Court For New York State, . . . docket No. CIV 1971-592. . . . The amended complaint, filed in the Western District Court of New York State, will be withdrawn as soon as the District Court of the District of Columbia, assumes jurisdiction of this case." (Respondents' Appendix pp. A 31, A-32)

Each defendant in the District of Columbia action is a defendant in the pending 1971 Western District of New York action. The complaints in both actions seek to vindicate the same alleged rights—including those claimed to arise under the Voting Rights Act of 1965—on the basis of virtually identical allegations.

Stating that, "[f]rom a reading of the complaint in this action, this Court concludes that there is no showing of a cause of action under [the Voting Rights Act of 1965] 42 USC 1973," and that "plaintiff's complaint alleges that this lawsuit was previously filed in the United States District Court for the Western District of New York and is presently pending therein," the District Court for the District of Columbia, Hon. William B. Jones, on April 2, 1974, *sua sponte*, transferred the District of Columbia action to the Western District of New York, where it was assigned Civil Action No. 74-185. (Respondents' Appendix pp. A-34—A-35)

Thereupon, several defendants moved for dismissal of the transferred action on the ground that it duplicates the pending 1971 action. Petitioner, prior to expiration of defendants' time to answer therein, moved for a summary judgment in the transferred action.

On May 6, 1974, the District Court for the Western District of New York denied petitioner's motion for a summary judgment and "in discretion" denied defendants' motion to dismiss the transferred action. Instead, based upon its conclusion that the two pending actions "have almost similar allegations, parties and seek essentially the same relief", the Court ordered that "any further proceedings in Civil 74-185 [the transferred District of Columbia action] are stayed until further order of the Court, and defendants' time to answer or to move is extended until further order."

(Petitioner's Appendix, p. 5-e) The order further provided:

> "Plaintiff may amend his complaint, add additional parties and allege additional facts in Civil 1971-592 as provided for in the order of March 29, 1974. . . . If plaintiff desires an extension of time to file his amended complaint in Civil 71-592, application may be made to the Court upon notice to the defendants." (Petitioner's Appendix, p. 5-e)

Disdaining to proceed in the original action, where he has yet to answer properly interrogatories filed April 18, 1974, petitioner, on August 5, 1974, in contravention of the then three-month-old stay in this transferred action, renewed his motion for a summary judgment and moved for the appointment of a three-judge court.

The District Court denied, from the bench, petitioner's collateral attack upon its order of May 6, 1974 and adhered to the stay therein. (Petitioner's Appendix, p. 12-k) On August 6, 1974, petitioner noticed an appeal from this order. The Court of Appeals for the Second Circuit, on October 22, 1974, granted, from the bench, defendants' motions to dismiss the appeal as from a non-appealable interlocutory order. The petition for a writ of certiorari seeks review of this order.

Argument

In transferring, *sua sponte*, this 1974 duplicate District of Columbia action to the United States District Court for the Western District of New York, the District Court for the District of Columbia, Hon. William B. Jones, stated:

> "From a reading of the complaint in this action, this Court concludes that there is no showing of a cause of action under [the Voting Rights Act of 1965] 42 USC 1973.

> Furthermore, plaintiff's complaint alleges that this lawsuit was previously filed in the United States District Court for the Western District of New York and is presently pending therein."

Each defendant in this 1974 action is a defendant in the 1971 action. The complaints in both actions seek to vindicate the same alleged rights—including those claimed to arise under the Voting Rights Act of 1965—on the basis of virtually identical allegations. Under these circumstances, the District Court's stay of further proceedings in this transferred action, pending further order, in view of the 1971 action wherein there had been extensive discovery, numerous motions, and one appeal, far from an abuse of discretion, constitutes a sound exercise of the discretion "inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." [*Landis v. North American Company*, 299 U.S. 248, 254 (1936)] Obviously, the District Court did not want two actions pending in the same Court between the same parties, for the same relief, with additional pleadings, discovery, and motions, unnecessarily requiring the time of the Court and of multiple attorneys.

Contrary to his claims of being suspended on a "rubber string" preventing his proceeding in either action, petitioner is, and at all times has been, free to proceed with his 1971 action.

Moreover, the Court of Appeals had no jurisdiction of petitioner's abortive appeal from the District Court's order of August 5, 1974. The order does not deny petitioner's motion for a summary judgment* or for the convening of a

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* See *Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966).

three-judge court.* It simply adheres to the then three-month-old order staying proceedings in the 1974 action while the 1971 action is pending.

In *Enelow v. New York Life Insurance Company*, 293 U.S. 379 (1935), this Court made it clear that a stay such as that ordered and reaffirmed by the District Court herein is not an "injunction" within the contemplation of 28 USC § 1292 (a) (1) but rather "a mere stay of proceedings which a court . . . may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice." (293 U.S. at 381-382) [See also *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 183 (1955); *Serrano v. Plaza Associates, Inc.*, 390 F. 2d 593 (1st Cir., 1968); *United States v. Chelsea Towers, Inc.*, 404 F. 2d 329 (3rd Cir., 1968); 9 *Moore's Federal Practice* ¶ 110.20 [4.-2] at 250. *Cf. International Nickel Company v. Martin J. Barry, Inc.*, 204 F. 2d 583 (4th Cir., 1953); *Motolese v. Preston*, 172 F. 2d 308 (2d Cir., 1949).]

Even if petitioner's appearance *pro se* in this Court excuses his failure to comply with paragraphs 4, 1(c), 1(d), and 1(h) of this Court's Rule 23, the petition for certiorari should be denied. There exists no error below and there are no "special and important reasons" for granting the petition. (Rule 19)

The petition involves nothing other than petitioner's pique at being thwarted in forum shopping. His sole purpose in instituting the District of Columbia action is stated frankly and repeatedly in the complaint therein (Respondents' Appendix pp. A-31—A-32) as well as in the petition

* *See Gonzalez v. Automatic Employees Credit Union, et al.*, 43 U.S.L.W. 4025 at 4028 n. 19 (U.S. Dec. 10, 1974); *Cancel v. Wagman*, 441 F. 2d 553 (2d Cir., 1971).

for certiorari (pp. 5, 6, 7, 8, 9, 14, and 15), namely, to broadcast his false and irresponsible accusations directed against the Chief United States District Judge for the Western District of New York.

Far from constituting a departure "from the accepted and usual course of judicial proceedings" (Rule 19(1)(b)), the stay inveighed against represents a sound exercise of judicial discretion in controlling "the progress of the cause so as to maintain the orderly processes of justice." [*Enelow v. New York Life Insurance Company, supra*, at 382.]

Conclusion

There are no "special and important reasons" for granting a writ of certiorari here. The petition should be denied.

Respectfully submitted,

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